

TITLE 7 HEALTH
CHAPTER 1 HEALTH GENERAL PROVISIONS
PART 9 CAREGIVERS CRIMINAL HISTORY SCREENING REQUIREMENTS

7.1.9.1 ISSUING AGENCY: New Mexico Department of Health.

7.1.9.2 SCOPE: This rule has general applicability to all applicants, caregivers, hospital caregivers, and care providers in New Mexico as defined in Section 7.1.9.7 NMAC of this rule. This rule does not apply to caregivers as set forth in Paragraph 2 of Subsection D of 7.1.9.7 NMAC and does not apply to care providers as set forth in Paragraph 2 of Subsection E. of 7.1.9.7 NMAC.

7.1.9.3 STATUTORY AUTHORITY: Sections 29-17-2 through 29-17-5, NMSA 1978 Amended.

7.1.9.4 DURATION: Permanent.

7.1.9.5 EFFECTIVE DATE: 01/06/06, unless a later date is cited at the end of a section.

7.1.9.6 OBJECTIVE: The objective of this part of Chapter 1, General Provisions, under Title 7, Health, is to establish the requirements for complying with the caregivers criminal history screening act. Generally included within these rules are the requirements and procedures for submission of applicant, caregiver and hospital caregiver fingerprints, payment of fees and administrative reconsideration for a disqualifying conviction. These rules are intended to have all covered care providers meeting the requirements of the act.

7.1.9.7 DEFINITIONS: For purposes of this rule, the following definitions shall apply:

A. "act" means Sections 29-17-2 to 29-17-5, NMSA 1978 of the caregivers criminal history screening act.

B. "applicant" means a person who applies, and is offered employment or contractual service with a care provider to provide services as a caregiver or hospital caregiver whether as an employee or contractor.

C. "care" means the therapy, services, treatment, support, supervision, assistance with the activities of daily living or management of a care recipient.

D. "caregiver" means any person whose employment or contractual service with a care provider includes direct care or routine and unsupervised physical or financial access to any care recipient serviced by that provider.

(1) "caregiver" includes:
(a) compensated persons such as employees, contractors and employees of contractors;
(b) guardianship service providers and case management entities that provide services to people with developmental disabilities; and

(c) administrators or operators of facilities who are routinely on site.

(2) "caregiver" does not include:
(a) persons who provide natural supports;
(b) independent health care professionals, licensed or medicaid certified in good standing, who are not otherwise associated with the care provider as an administrator, operator or employee, and who are involved in the treatment or management of the medical care of a care recipient such as attending or treating physicians or other health care professionals providing consultation or ancillary services; or

(c) a person who has undergone a nationwide or statewide criminal history screening under Sections 32A-15-1 to 32A-15-4, NMSA 1978, of the children's and juvenile facility criminal records screening act.

E. "care provider" includes:

(1) state owned or operated health care facilities, intermediate care facilities for the mentally retarded, general acute care hospitals, long-term care hospitals, psychiatric hospitals, rehabilitation hospitals, hospice services, guardianship providers, adult residential care facilities, adult community residential facilities, adult limited diagnostic treatment centers, case management entities providing services to persons with developmental disabilities, adult boarding homes, adult day care centers, adult family care homes, adult halfway homes, care providers operating respite, companion or personal care programs funded by the New Mexico aging and long term services department, care providers funded through the New Mexico children youth and families department providing homemaker and adult care services, disabled and elderly residential care providers providing services paid for in whole or in part by state funds, home health agencies, all residential habilitation service or respite service care

providers authorized to be reimbursed in whole or in part by state funds or under any medicaid or medicaid waiver program, nursing home facilities, any other care provider entity which is licensed or medicaid certified and which is not specifically identified herein.

(2) **“care provider”** does not include: outpatient treatment facilities, diagnostic and treatment facilities, ambulatory surgical centers and facilities, end-stage renal dialysis and treatment facilities, rural health clinics, private physicians’ offices or other clinics that operate in the same manner as private physicians’ offices in group practice settings, and any care facility located at or performing services exclusively for any correctional facility.

F. “care recipient” means any person under the care of a care provider who has a physical or mental illness, injury or disability or who suffers from any cognitive impairment that restricts or limits the person’s activities.

G. “conditional employment” means supervised employment pursuant to a bona fide offer of employment by a care provider to an applicant, caregiver or hospital caregiver, which is contingent upon the receipt of notice from the department that the applicant’s, caregiver’s or hospital caregiver’s nationwide and statewide criminal history screening indicates no existence of a disqualifying conviction, or notice from the department pending an administrative reconsideration procedure under Section 7.1.9.10 NMAC. This includes that period of employment during the time allowed for responding to the department’s request for additional information in cases where the applicant’s, caregiver’s or hospital caregiver’s criminal history record indicates an arrest without a final disposition for a crime listed under Section 7.1.9.11 NMAC.

H. “consent” means the written acknowledgment of permission to conduct a nationwide or statewide criminal history screening. Consent also includes, with respect to the criminal history record, permission for the department, following an attempt to obtain clarifying information from the applicant, caregiver or hospital caregiver to attribute, as a rebuttable presumption, disqualifying conviction status to any arrest for crimes that would constitute a disqualifying conviction and for which the arrest appearing on the nationwide criminal history record lacks a final disposition.

I. “department” means the New Mexico department of health, criminal history screening program.

J. “disqualifying conviction” means a plea, judgment or verdict of guilty, a plea of nolo contendere, an *Alford* plea or any plea or judgment entered in connection with a suspended sentence, in this state or from any other state or jurisdiction to a felony crime listed in 7.1.9.11 NMAC. If a conviction may be considered in or used for sentence enhancement in a subsequent proceeding, then it is a disqualifying conviction under these rules if the conviction is for a crime listed in 7.1.9.11 NMAC.

K. “hospital caregiver” means any person whose employment or contractual service with a care provider includes direct care or routine and unsupervised physical or financial access to any care recipient serviced by that care provider in an inpatient setting who is not a licensed New Mexico health care professional practicing within the scope of a profession’s license.

L. “nationwide criminal history screening” means a criminal history background investigation of an applicant, caregiver or hospital caregiver through the use of fingerprints reviewed by the department of public safety and submitted to the federal bureau of investigation, resulting in the generation of a nationwide criminal history record for that applicant, caregiver or hospital caregiver.

M. “nationwide criminal history record” means information collected by criminal justice agencies concerning an applicant’s, caregiver’s or hospital caregiver’s arrests, indictments or other formal criminal charges, and any dispositions arising therefrom, including convictions, dismissals, acquittals, sentencing and correctional supervision.

N. “natural supports” means those resources, systems and persons that are readily available to the general community, including a care recipient, without regard to the care provider.

O. “routine” means in the context of care provision or financial access by an applicant, caregiver or hospital caregiver, that which is non-episodic and regularly scheduled or assigned.

P. “supervised” means, in the context of care provision or financial access, the supervisory oversight a care provider employs to ensure the prevention of abuse, neglect or the misappropriation of property of a care recipient by a caregiver or hospital caregiver during the caregiver’s or hospital caregiver’s conditional employment period. Supervisory oversight shall include but is not limited to a management program utilized by the care provider, which demonstrates a systematic and routine monitoring of the safety and quality of service provided by the caregiver or hospital caregiver to the care recipient during the caregiver’s or hospital caregiver’s conditional employment period.

Q. “statewide criminal history screening” means a criminal history background investigation of an applicant, caregiver or hospital caregiver through the use of fingerprints reviewed by the department of public safety resulting in the generation of a statewide criminal history record of the applicant, caregiver or hospital caregiver.

R. “unsupervised” means, in the context of care provision or financial access, that which occurs without the on-site, visual or physical presence of another caregiver or hospital caregiver or a family member of the care recipient or of another individual representing the care provider.

7.1.9.8 CAREGIVER AND HOSPITAL CAREGIVER EMPLOYMENT REQUIREMENTS:

A. General: The responsibility for compliance with the requirements of the act applies to both the care provider and to all applicants, caregivers and hospital caregivers. All applicants for employment to whom an offer of employment is made or caregivers and hospital caregivers employed by or contracted to a care provider must consent to a nationwide and statewide criminal history screening, as described in Subsections D, E and F of this section, upon offer of employment or at the time of entering into a contractual relationship with the care provider. Care providers shall submit all fees and pertinent application information for all applicants, caregivers or hospital caregivers as described in Subsections D, E and F of this section. Pursuant to Section 29-17-5 NMSA 1978 (Amended) of the act, a care provider’s failure to comply is grounds for the state agency having enforcement authority with respect to the care provider to impose appropriate administrative sanctions and penalties.

B. Exception: A caregiver or hospital caregiver applying for employment or contracting services with a care provider within twelve (12) months of the caregiver’s or hospital caregiver’s most recent nationwide criminal history screening which list no disqualifying convictions shall only apply for a statewide criminal history screening upon offer of employment or at the time of entering into a contractual relationship with the care provider. At the discretion of the care provider a nationwide criminal history screening, additional to the required statewide criminal history screening, may be requested.

C. Conditional Employment: Applicants, caregivers, and hospital caregivers who have submitted all completed documents and paid all applicable fees for a nationwide and statewide criminal history screening may be deemed to have **conditional supervised employment** pending receipt of written notice given by the department as to whether the applicant, caregiver or hospital caregiver has a disqualifying conviction.

D. Application: In order for a nationwide criminal history record to be obtained and processed, the following shall be submitted to the department on forms provided by the department.

(1) A form containing personal identification which has a photograph of the person and which meets the requirements for employment eligibility in accordance with the immigration and nationality act as amended. A reasonable xerographic copy of a drivers license photograph will suffice under Subsection D of 7.1.9.8 NMAC.

(2) A signed authorization for release of information form.

(3) **Three (3) complete sets of readable fingerprint cards** or other department approved media acceptable to the department of public safety and the federal bureau of investigation submitted using black ink.

(4) The fee specified by the department for the nationwide and statewide criminal history screening investigation shall not exceed seventy-four (\$74) dollars. Of which, twenty-four (\$24) dollars shall be applied for the federal bureau of investigation nationwide criminal history screening, seven (\$7) dollars shall be applied for the statewide criminal history screening. The remaining application fee shall be applied to cover costs incurred by the Department to support activities required by the Act and these rules. The fees will not be applied to any other activity or expense undertaken by the Department.

(5) If the applicant, caregiver or hospital caregiver must submit another readable set of fingerprint cards upon notice that the fingerprint cards previously submitted were found unreadable, as determined by the federal bureau of investigation or department of public safety, the submission of a second set of fingerprint cards is required, a separate fee will not be charged. A fee shall be charged for submission of a third and subsequent fingerprint sets.

(6) If the applicant, caregiver or hospital caregiver has a physical or medical condition which prevents the applicant, caregiver or hospital caregiver from producing readable fingerprints using commonly available fingerprinting techniques, the applicant, caregiver or hospital caregiver shall submit the fingerprint cards with a notarized affidavit signed by the applicant, caregiver, hospital caregiver, returned to the department **within fourteen (14) calendar days**, as determined by the postmark, which provides:

(a) identification of the applicant, caregiver or hospital caregiver;

(b) an explanation of, or a statement describing, the applicant’s, caregiver’s or hospital caregiver’s good faith efforts to supply readable fingerprints; and

(c) the physical or medical reason that prevents the applicant, caregiver or hospital caregiver from producing readable fingerprints using commonly available fingerprinting techniques.

(d) An applicant, caregiver or hospital caregiver meeting the conditions of this paragraph and who has resided in the state of New Mexico for less than ten (10) years must also submit a ten (10) year work history in addition to the required affidavits.

(7) All documentation submitted to the department for the purposes of criminal history screening and for the purposes set forth in 7.1.9.9 NMAC and 7.1.9.10 NMAC shall become the sole property of the department with the exception of fingerprint cards which shall be destroyed upon clearance by both the federal bureau of investigation and department of public safety. All other submitted documentation shall be retained by the department for a period of one year from the final date of closure and thereafter shall be archived.

E. Fees: The federal bureau of investigation has a mandatory processing fee with no exceptions. The department and department of public safety impose a state processing and administrative fee. The fee payment must accompany the fingerprint application, or otherwise be credited to the department prior to or at the same time with the department's receipt of the application documents. The manner of payment of the fee is by bank cashier check or money order payable to the New Mexico department of health or other method of funds transfer acceptable to the department. Business checks will be accepted unless the business tendering the check has previously tendered a check to the department unsupported by sufficient funds. Neither cash nor personal checks will be accepted. The fee may be paid by the care provider or by the applicant, caregiver or hospital caregiver. The department will set a fee in addition to the fees imposed by department of public safety and the federal bureau of investigation that will fully and completely cover costs incurred by the department to support activities required by the act and these rules. The fees will not be applied to any other activity or expense undertaken by the department.

F. Timely Submission: Care providers shall submit all fees and pertinent application information for all individuals who meet the definition of an applicant, caregiver or hospital caregiver as described in Subsections B, D and K of 7.1.9.7 NMAC, no later than **twenty (20) calendar days** from the first day of employment or effective date of a contractual relationship with the care provider.

G. Maintenance of Records: Care providers shall maintain documentation relating to all employees and contractors evidencing compliance with the act and these rules.

(1) During the term of employment, care providers shall maintain evidence of each applicant, caregiver or hospital caregiver's clearance, pending reconsideration, or disqualification.

(2) Care providers shall maintain documented evidence showing the basis for any determination by the care provider that an employee or contractor performs job functions that do not fall within the scope of the requirement for nationwide or statewide criminal history screening. A memorandum in an employee's file stating "This employee does not provide direct care or have routine unsupervised physical or financial access to care recipients served by [name of care provider]," together with the employee's job description, shall suffice for record keeping purposes.

7.1.9.9 CAREGIVERS OR HOSPITAL CAREGIVERS AND APPLICANTS WITH DISQUALIFYING CONVICTIONS.

A. Prohibition on Employment: A care provider shall not hire or continue the employment or contractual services of any applicant, caregiver or hospital caregiver for whom the care provider has received notice of a disqualifying conviction, except as provided in Subsection B of this section.

(1) In cases where the criminal history record lists an arrest for a crime that would constitute a disqualifying conviction and no final disposition is listed for the arrest, the department will attempt to notify the applicant, caregiver or hospital caregiver and request information from the applicant, caregiver or hospital caregiver within timelines set forth in the department's notice regarding the final disposition of the arrest. Information requested by the department may be evidence, for example, a certified copy of an acquittal, dismissal or conviction of a lesser included crime.

(2) An applicant's, caregiver's or hospital caregiver's failure to respond within the required timelines regarding the final disposition of the arrest for a crime that would constitute a disqualifying conviction shall result in the applicant's, caregiver's or hospital caregiver's temporary disqualification from employment as a caregiver or hospital caregiver pending written documentation submitted to the department evidencing the final disposition of the arrest. Information submitted to the department may be evidence, for example, of the certified copy of an acquittal, dismissal or conviction of a lesser included crime. In instances where the applicant, caregiver or hospital caregiver has failed to respond within the required timelines the department shall provide notice by certified mail that an employment clearance has not been granted. The Care Provider shall then follow the procedure of Subsection A., of Section 7.1.9.9.

(3) The department will not make a final determination for an applicant, caregiver or hospital caregiver with a pending potentially disqualifying conviction for which no final disposition has been made. In

instances of a pending potentially disqualifying conviction for which no final disposition has been made, the department shall notify the care provider, applicant, caregiver or hospital caregiver by certified mail that an employment clearance has not been granted. The Care Provider shall then follow the procedure of Subsection A, of Section 7.1.9.9.

B. Employment Pending Reconsideration Determination: At the discretion of the care provider, an applicant, caregiver or hospital caregiver whose nationwide criminal history record reflects a disqualifying conviction and who has requested administrative reconsideration may **continue conditional supervised employment pending a determination on reconsideration.**

C. Notice of Final Determination of Disqualification: Upon receipt of a notice of final determination of disqualification a care provider shall:

(1) immediately and permanently remove an applicant, caregiver or hospital caregiver from any position of employment that meets the definition of an applicant, caregiver or hospital caregiver as set forth in Subsections D and K of 7.1.9.7NMAC; and

(2) **notify the department by letter within fourteen (14) calendar days, as determined by the postmark, of the date and type of action taken to satisfy the removal requirements of as set forth in Paragraph (1) of Subsection C of this section via written documentation signed by an authorized agent of the care provider.**

7.1.9.10 ADMINISTRATIVE RECONSIDERATION.

A. Availability: The applicant, caregiver or hospital caregiver whose nationwide criminal history record reflects a disqualifying conviction may request an informal administrative reconsideration from the department.

B. Procedure for Requesting Administrative Reconsideration:

(1) An applicant, caregiver or hospital caregiver given notice of a disqualifying conviction may submit a written request for an administrative reconsideration. To be effective, the written request shall:

(a) **be made within fourteen (14) calendar days, as determined by the postmark, from the date of the notice issued by the department;**

(b) be properly addressed to the department;

(c) state the applicants', caregivers' or hospital caregivers' name, home and work address, and telephone numbers;

(d) state the applicants', caregivers' or hospital caregivers' employer or proposed employer name, address and telephone numbers;

(e) state the date of hire;

(f) state the position title;

(g) describe the duties of the position; and

(h) describe the care recipients.

(2) If the applicant, caregiver or hospital caregiver wishes to submit and have considered additional documentation (as specified in Paragraph (1) of Subsection C of this section) that additional documentation must be included with the request for an administrative reconsideration.

(3) An applicant, caregiver or hospital caregiver requesting reconsideration shall include a signed declaration identifying with specificity any criminal felony convictions.

C. Written Documentation: The documentation submitted with the request for an administrative reconsideration may include information on the following.

(1) Credible and reliable evidence of the actual disposition of any arrest for which the nationwide criminal history record was incomplete. This could be evidence, for example, of the certified copies of an acquittal, a dismissal, or conviction of a lesser included crime, submitted to refute or rebut the presumption of a disqualifying conviction created because the nationwide criminal history record was incomplete in not showing the final disposition of an arrest for a crime that constitutes a disqualifying conviction.

(2) The applicant's, caregiver's or hospital caregiver's age at the time of each disqualifying conviction.

(3) Any mitigating circumstances when the offense was committed.

(4) Any court imposed sentence or punishment and, if completed, when completed.

(5) Any successfully completed rehabilitation program since the offense.

(6) The applicant's, caregiver's or hospital caregiver's full employment history since the disqualifying convictions.

(7) And other relevant materials the applicant, caregiver or hospital caregiver may wish to submit.

D. Reconsideration Proceeding: The reconsideration proceeding is intended to be an informal non-adversarial administrative review of written documentation. It will be conducted by a reconsideration committee designated for that purpose by the department. The reconsideration committee will issue an employment clearance determination based upon the completed request for reconsideration and all supporting documents submitted. In cases where the reconsideration committee finds the need for additional or clarifying information, the reconsideration committee may request that the applicant, caregiver or hospital caregiver supply such additional information within the time set forth in the reconsideration committees' request.

E. Factors in Determination: In determining whether an applicant's caregiver's or hospital caregiver's nationwide criminal history record reflects a disqualifying conviction may be employed, the reconsideration committee shall take into account the requirements of Section 28-2-1 to 28-2-6, NMSA 1978 of the criminal offender employment act. However, that act is not dispositive. The following factors may be considered:

- (1) total number of disqualifying convictions;
- (2) time elapsed since last disqualifying conviction or since discharge of sentence;
- (3) circumstances of crime including whether violence was involved;
- (4) activities evidencing rehabilitation, including but not limited to substance abuse or other rehabilitation programs;
- (5) whether conviction was expunged by the court or whether an unconditional pardon was granted;
- (6) false or misleading statements about any conviction in the signed declaration;
- (7) evidence that applicant, caregiver or hospital caregiver poses no risk of harm to the health and safety of care recipients; and
- (8) age of applicant, caregiver or hospital caregiver at time of disqualifying conviction.

F. Grounds for Reconsideration Employment Clearance Determination: An applicant, caregiver or hospital caregiver may be issued a reconsideration employment clearance determination by the department where the request for reconsideration and accompanying documentation clearly demonstrates that the applicant, caregiver or hospital caregiver has satisfied one of the following three grounds for a reconsideration employment clearance determination.

(1) **Inaccuracy:** The nationwide criminal history record inaccurately reflects a disqualifying conviction. This ground for a reconsideration employment clearance determination applies:

- (a) in instances of factual error in the nationwide criminal history record, from any source;
- (b) in instances of error arising from the departments' application or use of the inappropriate criminal statute or standard to the disqualifying conviction at issue; and
- (c) in instances where the department, pursuant to the applicant's, caregiver's or hospital caregiver's required consent, applies a rebuttable presumption of a disqualifying conviction to an arrest for a felony that lacks a final disposition in the nationwide criminal history record.

(2) **No Risk of Harm:** The employment or contractual services provided by an applicant, caregiver or hospital caregiver with a disqualifying conviction presents no risk of harm to a care recipient. The reconsideration employment clearance determination issued by the reconsideration committee under this ground may be limited, in certain cases, based upon the evidence in the request for reconsideration and the accompanying documentation. The reconsideration determination of whether the applicant, caregiver or hospital caregiver presents no risk of harm to a care recipient is based upon the risk arising from the disqualifying conviction.

(3) **No Bearing on Fitness:** The disqualifying conviction does not directly bear upon the applicant's, caregiver's or hospital caregiver's fitness for employment.

7.1.9.11 DISQUALIFYING CONVICTIONS. The following felony convictions disqualify an applicant, caregiver or hospital caregiver from employment or contractual services with a care provider:

- A. homicide;
- B. trafficking, or trafficking in controlled substances;
- C. kidnapping, false imprisonment, aggravated assault or aggravated battery;
- D. rape, criminal sexual penetration, criminal sexual contact, incest, indecent exposure, or other related felony sexual offenses;
- E. crimes involving adult abuse, neglect or financial exploitation;
- F. crimes involving child abuse or neglect;
- G. crimes involving robbery, larceny, extortion, **burglary**, fraud, forgery, embezzlement, credit card fraud, or receiving stolen property; or
- H. **an attempt, solicitation, or conspiracy involving any of the felonies in this subsection.**

History of 7.1.9. NMAC:
Pre NMAC History: None.

History of Repealed Material: 7 NMAC 1.9, Caregivers Criminal History Screening Requirements, filed 08-03-1998, repealed 08/15/02.